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RADIO STATION RESPONSIBILITY FOR EXTEMPORANEOUS DEFAMATION ---A REPLY

REYNOLDS C. SEITZ*

IN the February 1941 issue of this law review, Professor Vold† wrote a rejoinder to my previous¹ discussion of the topic indicated by the heading of this article. He contended for absolute liability. I did not.

It is recognized that it serves no purpose to continue the discussion over too long a period. This reply, therefore, is not intended to be a reiteration of what was set forth in the April 1940 Marquette Law Review. It is rather meant to emphasize what I suspect is true—that the chief difference between Professor Vold's views and mine is a disagreement as to wise public policy, just as we might or might not disagree concerning the wisdom of the recent Lease-Lend legislation. Certainly, I respect Professor Vold's learning and his present position. I would be content to let the matter drop if it were clearly apparent to the reader that our disagreement is on the basis of wise public policy. It seems, however, that Professor Vold's rejoinder tends² (I am sure very unconsciously) to convict me of unthinking, incomplete reasoning. It is hoped that this short discussion will clear the air and make it apparent that the difference which exists is based on two opposite concepts as to what is wise.

In the rejoinder the charge is made that I have contended for special privilege to radio stations. This is contrary to fact. In my original article it was made clear that whenever the *factual* picture was analogous to the newspaper situation and *consent* to publish was apparent, the radio station should bear the burden of absolute liability to the same degree as the newspaper. Professor Vold, of course, contends that the radio station "actually did transmit to listeners the utterances which the advertisers admittedly did speak into its microphone." He, therefore, rules out all talk about consent to publish. It is not the purpose here to quarrel with such a position. It is certainly one viewpoint that can be taken. But it does seem that all of Professor Vold's refutation of my consent theory has not succeeded in destroying it as a possible outlook. Perhaps such would have been a little more apparent

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¹ My original discussion appeared in 24 MARQ. L. REV. 117 (1940) under the title, *Responsibility of Radio Stations for Extemporaneous Defamation*.

² Perhaps following the pattern of my original article in which I challenged some of Professor Vold's views.

if Professor Vold had not neglected the statements made on page 122 of my original article.³

The utterances are here repeated:

"Having in mind the holdings under the automobile owner's liability statutes, the writer cannot recognize the validity in the argument that since permission *to use* was granted, and since the radio station when it grants such permission loses vital and sufficient control over the instrument to stop a defamatory remark, it has in effect consented to all that may possibly result. Such thinking seems to depend upon too liberal a connotation of the word "consent." It seems more logical to recognize that use by permission can be exceeded to such an extent as to vitiate consent. Such is certainly the attitude of the courts in adjudications arising out of automobile owner's liability statutes." (Then followed examples.)

And the point would have been made even clearer if Professor Vold had not neglected the following:

"It may be contended that the owner of an automobile cannot place limitations upon his consent as to the *manner* of operating his car. * * * Consequently, the argument may run that by analogy a caution not to depart from a manuscript would not vitiate consent. It would seem, however, that protagonists of such a view would be wrong. There appears to be a clear cut distinction between the two situations. In the automobile situation a restriction is good which forbids the doing of an *intentional* act and no good if it merely forbids the doing of a *negligent* act. Applying such a rule to the radio field, it becomes apparent that a departure from the manuscript is an *intentional* rather than a negligent act. Hence such a departure should vitiate the consent given and free the broadcasting station from liability."

Surely such language should show that the consent theory is not utterly unrealistic.

Professor Vold has another quarrel with my reasoning. He says absolute liability should be imposed upon radio stations because broadcasting is an ultrahazardous activity. I disagreed because I thought that if the radio picture was viewed as a whole—receiving set and broadcasting station—the "common usage" concept would remove broadcasting from the ultrahazardous area. Our differences again seem to be based upon contrasting ideas as to wise public policy. I would be content to let the matter rest if it were not for Professor Vold's attempt to destroy my "common usage" concept by the remark that "radio receiving sets certainly are not more broadly involved in common usage than are ordinary natural human eyes and ears, and yet the interrelationship and interdependence between ordinary speech and writing and such natural instrumentalities for receiving information does not abro-

³ Note 1, *supra*.

gate liability under the law of defamation in the case of ordinary publishers." Does the argument carry weight? Nothing would be defamatory if everyone were blind and deaf. Certainly, the fact that people can see and hear does not prove that radio activity cannot be classed within the area of common usage. To hold in such fashion would be no more sensible than to say that automobiles cannot be things of common usage simply because they are not more numerous than the human hands and feet which manipulate them. And while the matter of common usage is uppermost in mind it should not be forgotten that the radio field is just about as crowded as physical law will permit.

There remains one more argument which Professor Vold uses in his attempt to saddle absolute liability on broadcasting stations. He submits the "mutuality" test as a guide to the imposition of absolute liability. The test is indeed very impressive and significant. But the test might reasonably be thought of as having no application if it was felt that there was *no need* to impose absolute liability upon broadcasting stations within the area covered by this article. It would be possible to come to the conclusion that the injured parties would have adequate recourse against advertisers.

The proposition remains that logical reasons can be given for the non-imposition of absolute liability for extemporaneous defamation. In the final analysis wise public policy will determine the issue.

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